Supreme Court of the United States

OCTOBER 1950 TERM

No. 542

HARRY MINKOFF and BERNARD BORUCK,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND SUPPORTING BRIEF

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OCTOBER 1950 TERM

No.

HARRY MINKOFF and BERNARD BORUCK,
Petitioners.

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, by Jesse Climenko, their attorney, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit rendered January 9, 1950, which affirmed a judgment of the District Court of the United States for the Southern District of New York, convicting petitioners of violation of Title 18, Section 409, U. S. C. (possession of goods stolen from interstate commerce, with knowledge that the goods had been stolen), and with violation of Title 18, Section 88, U. S. C. (conspiracy, of which it was a part, that the defendants would knowingly receive and possess goods which had been stolen from interstate commerce); and also to review an order of said Court dated January 9, 1951 which affirmed an order of the United States District

Court for the Southern District of New York, denying petitioners' motion for an order indicating that if the case were remanded to the District Court, that Court would grant a new trial on the ground of newly discovered evidence.

Jurisdiction

The basis of jurisdiction is United States Code, Title 28, Section 1254.

Summary Statement of Matter Involved

The matter involved is the guilt or innocence of petitioners of the alleged conspiracy to receive and possess goods known by them to have been stolen from interstate commerce, and of petitioners' possession thereof; also the right of petitioners to a new trial by reason of newly discovered evidence.

The Questions Presented

The questions presented are:

1. Was there any competent proof that the goods involved were part of an interstate shipment?

2. Was there any competent evidence that either of the petitioners had "possession" of the goods within the meaning of the statute?

3. Was there any competent evidence that petitioner Minkoff, who alone was convicted on the conspiracy count, had knowledge that the goods had been stolen from an interstate shipment?

4. Was it error for the learned Trial Court to charge the jury that petitioners could be found guilty of the conspiracy alleged in the indictment (to receive and possess) if the Government proved "any one" of the overt acts alleged in the indictment, inasmuch as four of the six overt acts alleged in the indictment relate exclusively to a conspiracy among defendants Cordo, Di Pinto and Lief to steal the goods—a conspiracy of which petitioners had no knowledge and in which they did not participate, and which was completely consummated by the theft itself before petitioners had any contact with, or communication in reference to, the goods?

5. Was it error to receive in evidence a statement taken by the FBI from petitioner Boruck after seven hours of interrogation, without prior arraignment and without benefit of counsel or advice that he was entitled to counsel?

6. Was it error to send to the jury during their deliberations the whole of the statement taken from petitioner Boruck, although only a part thereof had been received in evidence and read to the jury during the trial?

7. Was it error to affirm the Order of the District Court, the effect of which was to deny petitioners a new trial on the ground that on the subsequent, unrelated trial of one Smolin for having purchased the goods here involved, Cordo recanted the evidence which he had given at the trial of this case—the only evidence in the case—that he had told petitioner Minkoff that the goods were stolen goods?

Reasons Relied On for the Allowance of the Writ

The reasons for the allowance of the writ are, in the opinion of counsel:

1. The decision of the Court of Appeals is in conflict with decisions in other Circuits on the question of "possession". The question does not appear to have been decided by this Court.

2. The decision of the Court of Appeals is in conflict with the decisions in other Circuits on the question whether or not the goods were in interstate commerce at the time they were stolen. The question does not appear to have been decided by this Court.

3. The holding of the Court below that there was evidence from which the jury could find that Minkoff had knowledge that the goods had been stolen from an interstate shipment is contrary to the decisions of this Court.

4. The decision below is in conflict with the decisions of this Court on the question of the propriety of the receipt in evidence of the statement of petitioner Boruck.

5. The Court instructed the jury that they could find petitioners guilty of the conspiracy alleged in the indictment if they found "any one of the overt acts alleged in the indictment had been proved", thereby authorizing the jury to convict petitioners of conspiracy to receive and possess, even though the only overt acts proved related to a conspiracy on the part of Cordo, Di Pinto and Lief to steal,—a conspiracy in which petitioners were in no way involved and which was consummated before petitioners had any knowledge of, or contact with, the goods. In so instructing the jury the District Court proceeded in conflict with decisions of this Court.

6. The decision of the Court below, in holding there was no error in the delivery to the jury of a document, only

part of which had been received in evidence and read to the jury during the trial, is contrary to decisions of this Court, and sanctions a departure from the accepted and usual course of judicial proceedings, calling for this Court's supervision.

7. The refusal to grant petitioners a new trial upon their showing that Cordo, the principal witness for the Government, subsequently recanted the testimony he gave in this case to the effect that he told Minkoff the goods were stolen goods, is contrary to decisions in other Circuits, and sanctions a departure from the accepted and usual course of judicial proceedings, calling for this Court's supervision.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record of all proceedings of the case entitled on its Docket—

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, against VITO JORDAN CORDO, PASQUALE WILLIAM DI PINTO, ARTHUR LIEF, HARRY MINKOFF, MAX BORUCK, BERNARD BORUCK and JAMES BORUCK, Defendants, HARRY MINKOFF and BERNARD BORUCK, Appellants.	No. C. 128-431

and that said Judgment and Order of the United States Court of Appeals for the Second Circuit be reversed by

this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: New York, N. Y., February 5, 1951.

HARRY MINKOFF,
BERNARD BORUCK,

By Jesse Climenko

Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER 1950 TERM

No.

HARRY MINKOFF and BERNARD BORUCK,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

(Italics ours.)

Preliminary Statement

Petitioners, together with Vito Jordan Cordo, Pasquale William Di Pinto, Arthur Lief, Max Boruck and James Boruck, were indicted in the Southern District of New York on two counts, the first (6 *) for violation of Title 18, Section 409, U. S. C. (possession of goods stolen from interstate commerce, with knowledge that the goods had been stolen); the second (7) for a violation of Title 18, Section 88, U. S. C. (conspiracy, of which it was a part, that the defendants would knowingly receive and possess goods which had been stolen from interstate commerce).

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* Unless otherwise indicated by the context, numbers in parentheses refer to pages of the Transcript of the Record on the appeal from the judgment of conviction.

Minkoff and the three Borucks pleaded not guilty and each was held in $5,000 bail (1).

Cordo, Di Pinto and Lief pleaded not guilty; each was released on his own recognizance (1), and all three appeared as Government witnesses in the trial of Minkoff and the three Borucks.

On the eve of trial, Cordo, Di Pinto and Lief changed their pleas to guilty, and sentence was adjourned until after the trial of the remaining defendants (2), which commenced on January 10, 1950, and concluded on January 17, 1950.

After being out upwards of nine hours (475, 485), the jury returned the following verdict (486): Max Boruck and James Boruck, not guilty; Minkoff, guilty on both counts; Bernard Boruck, not guilty on the conspiracy count, guilty on the possession count.

Minkoff was sentenced to five years imprisonment on the first count and two years on the second, the terms to run concurrently (2-3); Bernard Boruck was sentenced to two years imprisonment (2-3).

Cordo, Di Pinto and Lief remained unsentenced.

Almost immediately after petitioners were convicted, there came on for trial in the United States District Court for the Southern District of New York the case *United States* v. *Smolin*, in which the defendant there was tried on an indictment charging him with having received and possessed the very goods involved in the case against these petitioners. In the *Smolin* case, as in this case, Cordo was the principal witness for the Government. Under cross-examination in the *Smolin* case, Cordo gave the following testimony (11-12 of Transcript of Record on appeal from order):

> "Q. Do you recall that you also testified that you tried to sell these goods to Minkoff? I believe, on a Sunday? A. That is right.
>
> * * * * * *

Q. Did you at that time tell Minkoff what the goods were? A. I told him it was dress material.

* * * * * * *

Q. But you did not tell them anything else, you just told Minkoff dress goods? A. That is right.

* * * * * * *

Q. You did not tell him, for example, it was stolen goods? A. No, sir."

As soon as this testimony came to the knowledge of petitioners' attorney, he made a motion looking toward an order granting a new trial on the ground of newly discovered evidence, i.e., Cordo's recantation of his testimony in the present case—the only testimony to that effect in the record—that Minkoff had knowledge that the goods were stolen goods. That motion was denied.

Petitioners appealed from the judgment of conviction and from the order in reference to the new trial. Both appeals were heard together. The Court of Appeals affirmed the judgment and dismissed the appeal from the order in a single opinion.

The Opinion Below

The opinion of the Court of Appeals was handed down January 9, 1951, and has not yet been reported. A copy is printed (*infra*, pp. 43 *et seq.*).

Grounds of Jurisdiction

The basis of jurisidction is United States Code, Title 28, Section 1254.

Statement of the Case

During the afternoon of Saturday, April 27, 1946, pursuant to a plan previously laid out by them, Cordo, Di Pinto and Lief stole a number of cartons of merchandise from the warehouse of Whisenant Transfer Co. on East 27th Street, New York City. They loaded the merchandise on an enclosed truck and drove it to an open lot in Brooklyn, opposite Cordo's home, and there it remained until Monday morning, when it was driven back to Manhattan (62-68).

Neither Minkoff nor any of the Borucks are claimed to have been a party to the burglary in any way, and there is no suggestion that they knew anything about the thieves' plan to commit it.

On the Sunday morning following the burglary, in a telephone conversation, Cordo told Minkoff he had some piece goods which he would show Minkoff if he cared to look at them, and Minkoff agreed to meet Cordo in front of Cordo's house, of which Cordo then gave Minkoff the address (70).

At no time in that conversation did they discuss price, value or anything of that sort (94), or did Cordo tell Minkoff that the goods had been stolen (89).

When Minkoff arrived outside Cordo's house some three hours later, according to Cordo (71):

> "I said [to Minkoff], 'There is a truck right in the lot there.' I pointed out the truck to him. I said, 'I got a load of goods on there,' told him I had a load of hot goods. He said, 'When was it taken.' I told him it was taken Saturday."

This was "the end of the conversation", except that Minkoff told Cordo to bring the goods to a garage on 17th Street and Tenth Avenue, Manhattan, early the following morning (71).

Throughout that conference, the goods were in the truck standing in the lot across the street, and neither Cordo nor Minkoff went over to look at them (94).

There is no testimony that Cordo then, or at any other time, told Minkoff from where the goods had been stolen, or that they were part of an interstate shipment.

Early the following morning, Di Pinto and one Varelli, pursuant to arrangement with Cordo, called for the truck and drove it to the garage at 17th Street and Tenth Avenue, New York City (71-72). Cordo arrived at the garage between 8 and 8.15, about fifteen minutes before the truck (72).

Cordo testified (72) that upon entering the garage he saw Bernard and James Boruck, and that without further ado, although he had never met or spoken to either of them before (96), he said to them (73):

> "I got a load of hot goods and Harry told me to bring it down here this morning."

This statement, which both James (who was acquitted) and Bernard denied (194-195, 251), is the only piece of evidence in the entire record that Bernard was advised the goods had been stolen.

The garage belonged to Authority Trucking Co., a partnership in which Max Boruck and his own sons, James and Bernard, were interested (177). Minkoff had been a tenant of a small part of the garage—about 4 feet by 10 feet (181)—less than two months at that time (181, 232, 320), and used it to store bags of chemicals (182). For this his rent was $60 per month, and he paid, in addition, $5 a week for telephone accommodations (181).

The garage was a one-story building, 23 feet wide and 100 feet deep (178, 179), capable of holding nine trucks. In the extreme rear was a loading platform, from which a door opened into premises owned by John B. Harris Paper Company (179). On the day in question, one truck was at the repair shop, and the remaining eight were

stored, one at the entrance, two behind it, two behind the first two, and three "flush against the platform" in the rear (183).

Cordo testified that, upon the suggestion of the Boruck boys, his truck backed into the garage, all the way to the loading platform in the rear (73), and that he and the Boruck boys, together with Varelli and Di Pinto, had unloaded six or seven cartons from the truck when Max, the father, came in and ordered them to remove the goods (73-74). Cordo testified that they then put the merchandise back into the truck and Varelli and Di Pinto drove it away (73-74).

Di Pinto testified differently: he said (112) that no portion of the contents of the truck had been unloaded in the garage; that (130) "nothing was touched off the truck", and in this he was corroborated by the Borucks (251, 290), by Rountry (240) and by Walton (245). All these witnesses testified, not only that no truck had backed in and started to unload at the rear platform, but that it would have been a physical impossibility to do so (240, 243, 245, 251, 252, 290); that there were rows of trucks across the garage which blocked the way to the platform in the rear; that Max Boruck would not permit anyone to move them because, after the three or four nearest the front of the garage had been moved into the street, Bernard reported that a truck had been broken open during the night, and Max insisted that the remaining trucks, including three which were "flush to the platform" (191-192) along its entire width (241, 245), be left in place, just as they were, until the police came and inspected the premises (184, 185, 192, 193, 238-240, 250, 288, 289, 307). Rountry, a disinterested witness, and Walton, remembered the incident clearly, Rountry particularly, because it was the only one of its kind in his "whole experience" (243, 355). They were truck drivers, one for Emerson Radio and Phonograph Corporation (237), which used Borucks' trucks to make its deliveries (234); the other for Authority Trucking Co. (244). As the result of Max's instructions they were pre-

vented from taking their trucks out of the garage and were required to stand around until after the police came and made their inspection (193, 238-239).

Cordo testified that when Max Boruck refused to permit the truck to be unloaded in the garage, he directed his sons to show Di Pinto and Varelli a trailer in a lot on Tenth Avenue, between 14th and 15th Streets, in which they could put the goods (74). After Varelli and Di Pinto drove away, Bernard and James Boruck walked to the lot, and there found Varelli and Di Pinto with their truck (187).

The trailer in that lot was not the property of any of the Borucks, and they had never used, garaged or driven it (188-189). It was the property of United Trucking Corporation, a concern which kept its trucks at the 14th Street lot, but received its telephone messages at the Borucks' garage (188, 259, 321-322). The Borucks knew the truck was on the lot, and empty, because the preceding Friday night the driver of it had come to their garage and told them he was in a quandary as to what to do with goods he had aboard, since the consignee rejected the delivery and he, the driver, did not want to leave the goods in the trailer, unattended on the lot over the weekend. As a favor to him, the Borucks had permitted him to unload the goods into their garage before he took the trailer back to the lot where it was kept (189, 254, 321). It was some of these goods, incidentally, which were the subject of the burglary of the Borucks' garage during that weekend referred to above (254, 304).

According to Di Pinto, the only Government witness who was at the site of the trailer, the Boruck boys got into the trailer and Di Pinto and Varelli passed the cartons over to them (113). Bernard Boruck testified that he and his brother took no part whatever in unloading the contents of the truck into the trailer; that the truck was unable to back up flush to the trailer, and that he and his brother James merely stood by, between the truck and the trailer, to give a hand in case any of the cartons fell in between

the two vehicles while Varelli and Di Pinto passed them from one vehicle to the other (190).

The Borucks never asked or received anything for what they did (232), and there is no suggestion that they were ever interested in acquiring any of the goods.

By the time Minkoff arrived at the Boruck garage that morning, the truck had already been driven off by Di Pinto and Varelli (74). Cordo had remained behind, at the garage, and there Minkoff found him. They discussed a purchase of the goods by Minkoff, but he refused to make any offer, not having seen the material (75). Cordo says that Minkoff and Max Boruck then went to the trailer—which Max denies (292)—and that when they came back they had "with them" a roll of "piece goods" (75). Which one of the two had it, Cordo did not say; what kind of "goods" it was, or where they got it, or whether or not it was of the same character as the goods in the trailer, does not appear. Di Pinto, the only one of the Government witnesses who had been at the trailer, did not place either Max or Minkoff there at any time, and he said that nothing was taken out of the cartons, which were bound with metal bands (191), in the unloading process at the lot; neither he nor anyone else deny Bernard's testimony (195):

> "Q. Did you yourself tear open any of the cartons or were any opened that you could see what was in? A. No, definitely not."

Cordo states that when Max Boruck and Minkoff came back to the garage, Minkoff offered $3,000 "for the load"; that Cordo rejected the offer (75) and thereupon left (75-76) and ultimately sold the goods to someone else (76).

The foregoing, we believe, is a summary of the testimony on the material facts of the case.

With respect to the persons involved, we deem it appropriate to point out the following:

Cordo and Di Pinto, the Government's principal witnesses, were confirmed and vicious criminals who, from long experience, had learned the advantages of giving evidence against their co-defendants.

Di Pinto was convicted of burglary as far back as twenty years ago, and served time for it (105). He has been convicted of at least three different crimes of burglary, breaking and entering (116), and has pleaded guilty to six to eight indictments in the United States District Court for thefts in interstate commerce and conspiracy (105, 106, 115). He admits he was a highjacker of trucks (120), and that he has twice testified for the Government in highjacking prosecutions in which he was a defendant. Despite this record he has never been sentenced, except for the burglary about twenty years ago (105, 115), and he hoped to receive "consideration" for his testimony (122).

Cordo had pleaded guilty to six indictments, three in this case, and three others (61) for thefts in interstate commerce, possession of stolen goods and conspiracy (61). He admitted the commission of four separate thefts (98), and his criminal record went back to 1930, when he served time for sale and possession of beer in violation of law (61-62). He had been a party to the criminal activities of the Westo Gang, for which he was indicted in Brooklyn and turned State's evidence (85), and in 1947 he was involved in highjacking trucks with Di Pinto (83-84) for which he was indicted and pleaded guilty (61).

Though he pleaded guilty to all these indictments, some almost three years before the trial herein (85), he had never been sentenced and was still walking around a free man (61, 85, 86, 102).

Lief, the third Government witness, has pleaded guilty to three indictments for theft in interstate commerce (144). His testimony in this case is limited to the evidence concerning the conspiracy by Cordo, Di Pinto and himself to

steal the goods from Whisenant, and their theft thereof. He does not implicate petitioners.

Bernard Boruck, who was convicted on the testimony of Cordo and Di Pinto, was thirty-three years old at the time of the trial (177). He had then been married nine years and had two children, one aged three, and the other seven (177), and had served in the armed services for two years (178). With his father, Max, and his brother, James, he was the owner of Authority Trucking Corporation in which he has been interested since 1937 (177-178). This business was originated by his father over twenty years ago, starting with a single truck (283-4). As the boys grew up they were taken into the business (249, 284), and by dint of exceptionally hard work during long hours on the part of all three of them (179, 184, 249, 251, 259, 282, 283, 287) the business had been built up to the point where, at the time of trial, they owned their own garage and had twenty-two or twenty-three trucks in operation (178).

Although it is evident from the searching cross-examination conducted by the learned Assistant United States Attorney (206, 210, 222, 223, 255, 256), that he had investigated thoroughly into their past, not a word in derogation of their characters or prior activities was introduced, and there is no suggestion that the breath of suspicion has ever before attached to any of them in his business or private life.

There is no suggestion that the Borucks, or any of them, ever considered acquiring any of the goods or that they ever asked for or were promised anything for what they are alleged to have done, or that they were to profit in any way by it.

It is not surprising, in view of this record, that in sentencing Bernard Boruck the learned District Judge said (512):

> "Bernard Boruck, of course, particularly in view of what the jury did with respect to his father and his brother, with regard to him I can see that there might be reason for argument as to whether he is guilty or innocent of the crime charged.

However, on that score the jury found him guilty and I am bound by the verdict of the jury. I would be just as happy if they hadn't."

With respect to Minkoff:

As previously stated, the only testimony that Minkoff knew the goods had been stolen was that given by Cordo, i.e., that in the conversation with Minkoff in front of Cordo's house on Sunday morning, he told Minkoff that the goods in the truck across the street were "hot" and had been "taken" the day before (71).

Cordo gave that testimony on January 10, 1950. Eight short days later, in an unrelated prosecution of one Smolin, the purchaser of these very goods, Cordo was again the principal witness for the Government. In his testimony there, Cordo recanted the testimony he had given in this case and swore that he had *not* told Minkoff that the goods had been stolen. Referring to his testimony in the instant case, Cordo testified in the *Smolin* case (11-12 of Transcript of Record on Appeal from Order):

"Q. Do you recall that you also testified that you tried to sell these goods to Minkoff? I believe, on a Sunday? A. That is right.

* * * * * * *

Q. Did you at that time tell Minkoff what the goods were? A. I told him it was dress material.

* * * * * * *

Q. But you did not tell them anything else, you just told Minkoff dress goods? A. That is right.

* * * * * * *

Q. *You did not tell him, for example, it was stolen goods?* A. *No, sir.*"

On the basis of that recantation, petitioners sought a new trial. Their motion was denied by order of the District Court and their appeal therefrom was dismissed (infra, p. 49).

The dismissal of that appeal and the affirmance of the judgment of conviction are sought to be reviewed by the writ of certiorari now applied for.

Specification of Errors

1. The Court of Appeals erred in holding that petitioners had "possession" of the goods;

2. The Court of Appeals erred in holding that the goods were in interstate commerce at the time they were stolen;

3. The Court of Appeals erred in holding that Minkoff had knowledge that the goods had been stolen from an interstate shipment;

4. The Court of Appeals erred in sustaining the reception into evidence of the statement of petitioner Boruck;

5. The Trial Court erred in instructing the jury that they could find petitioners guilty of the conspiracy alleged in the indictment (receiving and possessing) if they found "any one of the overt acts alleged in the indictment to be found proved", even though four of the six overt acts alleged related to a conspiracy to steal on the part of Cordo, Di Pinto and Lief in which petitioners were in no way involved and which had been consummated by the theft before petitioners had any contact with the thieves or the stolen goods;

6. The Court of Appeals erred in holding there was no error in the delivery to the jury, during its deliberations, of the whole of a document of which only part had been received in evidence and read to the jury during the trial;

7. It was error to affirm the order refusing to grant petitioners a new trial upon their showing that Cordo, on whose testimony the conviction depended, subsequently, in an unrelated case, recanted the testimony he gave in this one.

Summary of Argument

The following is a summary statement of petitioners' argument:

There is no proof that petitioners ever had "possession" of the goods within the meaning of the statute;

There is no probative evidence that the goods here involved were part of an interstate shipment;

There is no evidence that petitioner Minkoff, who alone was convicted on the conspiracy count, had knowledge that the goods had been stolen from an interstate shipment;

It was error to receive in evidence the statement taken by the FBI from petitioner Boruck after seven hours of interrogation, without prior arraignment and without benefit of counsel or advice that he was entitled to counsel;

It was error to send to the jury, during its deliberations, the whole of petitioner Boruck's statement, inasmuch as only a part of which had been received in evidence and read to the jury during the trial;

It was error for the learned Trial Court to charge the jury that petitioners could be found guilty of the conspiracy alleged in the indictment (to receive and possess) if the Government proved "any one" of the overt acts alleged in the indictment, inasmuch as four of the six overt acts alleged in the indictment relate exclusively to a conspiracy among Cordo, Di Pinto and Lief to steal the goods, of which conspiracy petitioners had no knowledge, in which they did not participate, and which was completely consummated by the theft itself before petitioners had any communication in reference to the goods;

It was error to deny appellants a new trial by reason of Cordo's recantation, in a subsequent unrelated

prosecution of the purchaser of the goods here involved, of his testimony in this case—the only testimony on the subject—that he told Minkoff that the goods were stolen goods.

POINT I

Although there is no dispute that Cordo, Di Pinto and Lief stole a quantity of goods from the Whisenant terminal, there is no probative evidence that what they took was part of a shipment in interstate commerce.

To establish its case, the Government was required to prove that the stolen merchandise had been taken from an interstate shipment.

The Government attempted to prove this link in its case by the testimony of Mr. Leeds (48), who had been general traffic manager of the Whisenant terminal at the time of the burglary, and the testimony of Miss D'Amato, who had been his assistant at that time (25).

Mr. Leeds and Miss D'Amato testified to the effect that when an investigation of the contents of the terminal was made on April 29th, the Monday morning *following* the burglary, some twenty cartons were "missing" or "short" from a shipment which had come by truck from North Carolina the preceding Friday afternoon.

However, it soon developed that neither of these witnesses had any personal knowledge that the goods they described as "missing" and "short" had ever been received at the terminal; they were merely *assuming* the "shortage" from the fact that they were unable to find about twenty cartons which were among upwards of a hundred items listed on a "truck manifest" (Ex. 1, opposite p. 516) which accompanied a delivery received the preceding Friday afternoon.

No one who was present at the loading of the truck in North Carolina was called to testify to what was put

aboard; no one who was present at the unloading of the truck in New York was called to testify to what was taken off it; no one was produced to testify that he checked the goods delivered against the manifest at the time of the delivery, or at any other time prior to the burglary, to verify that the delivery did, in truth, include all the cartons recited on the manifest. For all that appears, the cartons listed on the invoice and here involved were never loaded on the truck in North Carolina, or, if they were, had never arrived here, or, if they had, were not in the terminal at the time of the burglary.

Thus, after Miss D'Amato had said (28) that the merchandise covered by the manifest had "arrived" at the terminal on Friday, April 26, 1946, she frankly admitted that she had not seen it arrive (42); that she had not checked it (40, 41), and that she testified entirely according to notations which had been made by others on the "papers" at the time of the "checking" *on the Monday morning following the burglary* (45), and by what "the boys" had reported to her in reference thereto (40).

Mr. Leeds, after testifying that the goods "arrived" at the New York terminal on Friday, the 26th (50), testified (50, 51) that he checked for the first time *on Monday, the 29th*, and it was not until then that the "shortage" was discovered (52).

Leeds testified (57) that he knew that the "markings" on the cartons which he referred to as "missing" on Monday morning, April 29th, were the same as those on the cartons which were still in the terminal, because he "saw" them Saturday afternoon. However, he was not then testifying with respect to any check on Saturday afternoon to determine that all 104 of the cartons listed on the manifest were there, but merely to the fact that the cartons he saw on Saturday afternoon had on them markings showing names and addresses of various out-of-the-State consignors, just as the cartons he saw on Monday morning had markings showing names and addresses of various out-of-the-State consignors (57)—the questions at that stage of the

examination being directed to showing, not that all the cartons listed on the manifest were there on Saturday morning, but that the goods which *were* received were an interstate shipment. Nothing in that testimony was evidence that the cartons here involved had been received as part of the shipment which arrived from North Carolina on April 27th.

Mr. Leeds stated also (59) that he had occasion to go into the terminal on Saturday morning and that on Saturday afternoon he inspected to see that the doors were locked (60), but he does not say that he made any effort on either of these occasions to check the cartons against the manifest.

There is no other evidence relating to the subject.

We submit there was not only an absence of proof beyond a reasonable doubt, but an absence of any proof, that the cartons stolen by Cordo, Di Pinto and Lief were part of an interstate shipment.

POINT II

The evidence shows that Minkoff did not know the goods were in interstate commerce at the time Cordo, Di Pinto and Lief stole them. Hence the conviction of Minkoff on the conspiracy count should be reversed.

The error below with respect to the out-of-State origin of the cartons stolen by Cordo, Di Pinto and Lief is tied into the erroneous finding by the Court below that Minkoff knew the goods had been stolen. This error resulted from the erroneous assumption (1) that the stolen cartons bore labels containing the names and addresses of North Carolina consignors and New York consignees, and (2) that Minkoff saw these labels.

There is no evidence to support either of those assumptions.

Minkoff appears in the transaction on only three occasions: first, in the telephone conversation with Cordo on

Sunday morning, the day after the goods were stolen; second, in the meeting with Cordo later that same morning, and third, at Borucks' garage on Monday morning.

According to Cordo's testimony—and there is none other on this point—when he spoke to Minkoff on the telephone on Sunday morning he did not even tell Minkoff that the goods had been stolen, much less that they had been stolen from an interstate shipment (89).

In the conference later that morning in front of Cordo's home, according to Cordo—and again there is no other testimony on the subject (71)—

> "I said, 'There is a truck right in the lot there.' I pointed out the truck to him. I said, 'I got a load of goods on there,' told him I had a load of hot goods. He said, 'When was it taken?' I told him it was taken Saturday."

The goods were then in an enclosed truck in a lot across the street (94), and neither Cordo nor Minkoff went over to look at them (94).

Thereupon (71) Minkoff told Cordo to bring the goods to the garage on 17th Street and Tenth Avenue the following day.

> "Q. And that was the end of the conversation with you? A. Yes, sir, with the exceptance that he says to bring it down in the morning—early in the morning" (71).

On Monday morning, by the time Minkoff reached the garage, the truck, with the merchandise in it, had already been driven away by Varelli and Di Pinto (74).

After Minkoff arrived at the garage, there was some discussion between him and Cordo, but nothing in reference to the origin of the goods; then, according to Cordo (75), Max Boruck and Minkoff "went to the trailer", and when they came back to the garage they had a roll of "piece goods with them" (75). There is no evidence as to which of them had the goods, or where it came from, or that it was similar to the goods in the cartons.

Cordo admits that when Minkoff and Boruck left the garage he did not accompany them; he remained at the garage until they returned (75). He does not claim they told him where they had been. His testimony that they "went to the trailer" is, patently, a mere speculation on his part, without any probative value. Max Boruck denied that he and Minkoff went to the trailer (292), and Di Pinto, who was at the trailer, does not place either Max Boruck or Minkoff there at any time; neither does he say any of the goods were taken from the metal bound cartons (191), nor does he, or any other witness, contradict Bernard Boruck's testimony (195):

> "Q. Did you yourself tear open any of the cartons or were any opened that you could see in? A. No, definitely not."

We have discussed this piece of Cordo's testimony in some detail only because the Government may argue, even though there is no evidence to sustain it, that the jury may have assumed that the roll of "piece goods" came from one of the cartons in the trailer; that therefore they may have inferred that Minkoff had been at the trailer; that therefore they may have inferred that he read the markings on the cartons; that, if all these unsupported assumptions and inferences were accepted as facts, Minkoff would have seen that the cartons were marked with addresses of consignees in North Carolina, and that, therefore, he knew that the roll of piece goods was taken from an interstate shipment. Indulgence in such a succession of unsupported speculations, one piled on the other, would certainly not make the conclusion compatible with the requirement that circumstantial evidence must not only be consistent with guilt, but must "exclude every other hypothesis but that of guilt" (*Grantello* v. *U. S.*, 8th Cir., 3 F. (2d) 117, 118, and cases there cited).

As shown above (pp. 20-22), there is no evidence that the stolen cartons had on them labels showing out-of-State

origin; neither is there any evidence that Minkoff went to the trailer or that he ever saw the labels, if there were any, on the cartons. There can, accordingly, be no basis for a finding that he knew the goods had been in interstate commerce at the time the thieves stole them.

POINT III

The evidence is insufficient, as a matter of law, to prove that either petitioner ever had "possession" of the stolen goods, with the meaning of the statute under which petitioners were indicted.

The Court instructed the jury (479):

> "I think I can answer your question this way: by saying that the possession contemplated by the statute does not necessarily mean having the so-called bird in the hand. Constructive possession is sufficient, that is, if the defendants had dominion or control over the goods in question. That is the legal notion of possession, the possession contemplated by the statute in this case."

The evidence is clear and uncontroverted, indeed, it is the Government's own proof, that neither petitioner ever had "dominion or control" over the goods.

As to petitioner Bernard Boruck

According to Cordo, six cartons were unloaded from the truck to the loading platform in the Boruck garage, and promptly put back into the truck (73-74) and driven away to the trailer.

The only other occasion on which Bernard was near the goods was when they were transferred from the truck to the trailer at the lot on Tenth Avenue. Here, again, even on the Government's version, the most Bernard did was to help in transferring the cartons from the truck to the trailer (113).

There is no dispute about the fact that the trailer did not belong to the Borucks; they had never garaged, used or driven it; it was the property of United Trucking Corporation (188-189), a concern with which the Borucks had no relations except that they received, and relayed to United Trucking Corporation, telephone messages which they received but which were intended for United (188, 259, 321-322).

As to petitioner Minkoff

Minkoff did not see or touch any of the goods on Sunday, while they were in the truck in the lot across the street from Cordo's house. By the time he arrived at the Boruck garage next morning, the truck with the goods in it had already left. There is no proof he ever saw, touched or took charge of them (see *supra*, pp. 22-25).

Neither Minkoff nor Bernard Boruck was ever alone with the goods; neither ever claimed or exercised any power of dominion or control or disposition over them; either Cordo or Di Pinto, or both, were present throughout, and they were at all times recognized by Bernard and Minkoff as the only ones having the power of disposition or control of the goods. In such circumstances, they did not have "possession".

In *Grantello* v. *U. S.*, 8th Cir., 3 F. (2d) 117, Circuit Judge Sanborn said (p. 118):

> "Possession of the instruments or fruits of crime by a defendant in order to be incriminating must have been known to him, actual, *dominant*, with *plenary power of disposition.*" (Citing authorities.)

In *Toney* v. *U. S.*, Ct. App. D. C., 67 F. (2d) 573, the Court said (p. 574):

> "To be guilty of the charge of possession, plaintiff in error must have had such dominion and control of the liquor as would have given him *the power of dis-*

posal, and the fact that he knew whiskey was to be had at the place in question, *or that he transported it* or bought it, is not enough. He is not charged with any of those offenses."

In *U. S.* v. *Curzio,* 3rd Cir., 170 F. (2d) 354, appellant had been indicted for illegal possession of ration coupons and ration stamps. In reversing the conviction for the failure of the Trial Court properly to charge the jury on the question of "possession", the Court said (p. 357):

> "Possession involves *power to control* and *intent to control.*"

In *Colbaugh* v. *U. S.,* 8th Cir., 15 F. (2d) 929, in reversing a conviction of possessing whiskey, the Court said (p. 931):

> "Possession of liquor, as of other instruments and fruits of crime, involves knowledge, *dominion, and control,* with *plenary power of disposal in the alleged possessor.*"

In *Patrilo et al.* v. *U. S.,* 8th Cir., 7 F. (2d) 804, appellants were convicted of possession of property designed for the manufacturing of intoxicating liquor. Appellants Genino and Catalano were servants in the house of appellant Patrilo, and when Patrilo was apprehended in his home, Genino and Catalano fled from the house. After referring to the charge of possession, the Court said (p. 805):

> "*This means more than physical presence and the laying on of hands.* As the pleader aptly charged, *it means unlawful custody and control.* * * * They [Genino and Catalano] were Patrilo's hired servants. Aside from that it does not appear they had anything else to do with it, and those services did not convert Patrilo's possession and control into the joint possession, custody and control of themselves and Patrilo, within the meaning of the law. *Grantello* v. *United States* (C. C. A.), 3 F. (2d) 117. No case was made against Genino and Catalano on that count. Their request for an instructed verdict should have been granted."

There is no suggestion that either Bernard or Minkoff ever had the "power of control" or "intent to control" or "plenary power of disposal", and absent these, under the cases cited above, the mere "laying on of hands" or "transportation" does not constitute "possession".

The finding of possession by the jury was not only contrary to the cases cited, it was contrary to the law of the case as laid down in the charge, i.e. (479), that possession means having "dominion or control" over the goods.

The learned Court below referred to the fact that Bernard Boruck was one of the partners in control of the Authority Garage; that after the interrupted unloading at the garage, it was Bernard Boruck who provided "a substitute", the trailer, and helped put the goods there, and

> "We think that an adequate basis on which the jury could find that he had the requisite possession of the goods while they were in the trailer."

As to Minkoff, the learned Court below continued:

> "Of course, this (Bernard's) was not exclusive 'possession', for he acted with and for Minkoff, who had taken it upon himself to store the goods and had insisted that his landlord provide storage space. Since the trailer was provided for that purpose, the situation is no different for the purposes of this appeal than it would be if a part of the garage had been so used. The trailer was owned by a company for whom the Borucks were dispatchers and appellant Boruck knew it would be unused by its owner for a few days and available to him for storage use to which he put it. Thus there was sufficient evidence to enable the jury to find that both the appellants possessed the goods."

It is submitted that merely because Minkoff asked, or even "insisted", that Bernard provide storage space, the mere description by Bernard of a place which he knew was

available—a place which neither Bernard nor Minkoff owned and over which neither of them had dominion or control—would not be equivalent to the use of a part of the garage owned by the Borucks, and that the deposit of the goods in such a trailer by Di Pinto did not put either Bernard Boruck or Minkoff in "possession" of the goods.

For this, we submit, the cases cited above are authority.

None of the cases so cited is referred to in the opinion of the learned Court below, and that Court cited no case in support of its conclusion contrary to those cases.

By reason of the conflict between the opinion below and the authorities in other Circuits, it is submitted that a question is presented which should be passed upon by this Court.

POINT IV

It was error to receive in evidence the statement taken by FBI Agents from Bernard Boruck after seven hours of interrogation, without prior arraignment and without benefit of counsel or advice that he was entitled to counsel.

Bernard Boruck was arrested on November 24, 1947 and, without prior arraignment, taken to the office of the FBI in the Federal Court House in the Borough of Manhattan (196). There he was kept under interrogation continually for seven hours by Special Agents of the FBI (205). By that time a year and a half had elapsed since the occurrence of the events concerning which they interrogated him (228). When they finished with him they wrote out, and had him sign, a statement which was introduced as part of the Government's case (164-166).

This statement (522-524; Exhibit 12) opens with the customary recital that it is a "voluntary statement" and made "without any threats or promises" and with a realiza-

tion that it can be used against the maker thereof in a "court of law." To such recitals, inserted into statements by governmental interrogators, and which "merely formalize constitutional requirements" this Court, in *Haley* v. *Ohio,* 332 U. S. 596, said (601):

> "we cannot give any weight."

Moreover, even in these recitals there is nothing to suggest that Bernard Boruck had, or was advised that he was entitled to have, the advice of counsel or the presence of friend or counselor. This omission has frequently been commented on in holding confessions to have been improperly received in evidence. *McNabb* v. *United States,* 318 U. S. 332, and cases there cited (p. 340); *Watts* v. *Indiana,* 338 U. S. 49, 59.

In the *McNabb* case, 318 U. S. 322, involving a revolting crime resulting in the death of a law enforcement officer, the confession of Benjamin McNabb

> "was secured by detaining him unlawfully and questioning him continuously for five or six hours" (p. 345).

This had been done while he was (p. 345) "in the custody of the arresting officers and before any order of commitment had been made" and "without the aid of friends or the benefit of counsel." Speaking of this and other confessions in the case, the Court said (p. 345):

> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law."

The policy of Congress, so referred to, is reflected in Federal Statutes. With these in mind, Mr. Justice Frankfurter said (p. 341-2):

> "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * * ' 18 U. S. C. § 595. Similarly the Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 U. S. C. § 300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that 'the person arrested shall be *immediately* taken before a committing officer'."

Further, at page 344:

> "For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.

> "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon Federal law officers."

Finally, Mr. Justice Frankfurter said (p. 347):

> "We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

See also, to the same effect:

> *Anderson* v. *U. S.*, 318 U. S. 350;
> *Haley* v. *Ohio*, 332 U. S. 596;
> *Ashcraft* v. *Tennessee*, 322 U. S. 143;
> *Watts* v. *Indiana*, 338 U. S. 49;
> *Turner* v. *Pennsylvania*, 338 U. S. 62.

The consequences of intensive interrogation before arraignment, without the benefit of the advice and protection of counsel, or the guidance and support of a friend, is exemplified by what happened here. When the witness pointed out that the writing made by the FBI agents was inaccurate, and that he had relied on them to put down what he told them, as he had told it to them (205):

> "Q. You assumed that it meant the same? A. Sure. After all when you are questioned for seven hours——"

See also, 220, 228.

As the Court said in the *Ashcraft* case, in rejecting an alleged confession (322 U. S. 143, 152):

> "Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices."

More recently, in the *Watts* case (338 U. S. 49), Mr. Justice Douglas said (p. 57):

> "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw, as we did in Malinski v. New York 324 U. S. 401, and Haley v. Ohio, 332 U. S. 596, any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country."

It is no answer to say that subsequent events or other testimony shows that the "confession" was true; the vice lies in the method by which it was obtained and it was reversible error to receive it, no matter how true its contents may have been shown to be (*Watts* v. *Indiana*, 338 U. S. 49, 58).

The statement here was prejudicial not only to Bernard Boruck, but, because of its contents, to Minkoff, as well (see 523-4).

The learned Court below held that the reception of the statement in evidence was not error, (1) because the statement was received without objection; (2) because there is no evidence that it was "the result of coercion or illegal detention contrary to the McNabb rule"; and (3) because the statement was not "in any real sense a confession but was obviously intended to be exculpatory".

That the statement was not deemed to be, and is not, "exculpatory", is shown by the fact that the Government regarded it as sufficiently incriminating to introduce it as part of its direct case, and by the further fact that in its opinion the Court of Appeals held that Boruck's unlawful "possession" of the goods was established by his disclosure

to Di Pinto of the availability of the trailer and his help to Di Pinto in transferring the goods from the truck to the trailer, *all of which is set forth in the statement.*

We believe that under the opinions of this Court, the taking of the statement under the circumstances here presented was, per se, coercive and illegal, and it was not entitled to be received in evidence. We believe, also, that under the Rules of Criminal Procedure (Rule 52) and decisions in other cases (*U. S.* v. *Ward,* 3rd Cir. 168 Fed. 2d. 226; *Robertson* v. *U. S.,* 171 Fed. 2d 345, U. S. C. A., D. C.), such an error should be corrected by an Appellate Court even though no objection was made at the time the statement was offered.

POINT V

It was error to send to the jury the whole of Bernard Boruck's statement, including a part thereof which had not been received in evidence and had not been read to the jury.

It is said in the opinion of the learned Court below that the record does not show that only a part of Bernard Boruck's statement was received in evidence, and that there is, accordingly, nothing in the record to support this claimed error. In this, we submit, the learned Court of Appeals was in error.

At page 166 the Government introduced into evidence petitioner Boruck's statement to the FBI.

Immediately prior thereto (165-166) there had been a conference at the Bench among the United States Attorney and counsel for defendants. What happened at that conference is not set forth at that point in the record, but it does appear in the course of the proceedings on sentence. Counsel for Bernard said, without dispute (508):

> "prior to the start of the trial before the jury Mr. Hilly and myself had agreed that as to the statement made by Mr. Boruck to the Federal Bureau of Investigation

at the time of his arrest, that one paragraph which commenced something like this: 'I know the merchandise or I knew the merchandise was black market, I knew that Mr. Minkoff had been dealing in blackmarket goods' or something to that effect—it was one of the almost last paragraphs—that entire paragraph was omitted from the statement by agreement."

"When Mr. Hilly introduced that statement into evidence he went to the bench with me and he very fairly stated that of course he was introducing the statement into evidence and that that part would not be used and was not part of that particular statement, and when he read the statement to the jury, he very fairly read it, and didn't hesitate or stumble and he did not read that particular paragraph that we had agreed would not be in the statement."

Mr. Delaney also stated (511) that he was "sure Mr. Hilly's recollection would confirm what I say", and Mr. Hilly did not dispute anything Mr. Delaney then said. The Court then stated (511):

"I recall the agreement you had with Mr. Hilly as to the admissibility of that paragraph,"

but reaffirmed his view that it had been proper to send the whole of the statement to the jury, not because the whole of it had been received in evidence, but because

"Mr. Hilly subsequently insisted, and I think properly, that the jury see that part of the statement following up his line of interrogation on the question of credibility".

That the whole of the statement was not put in evidence or read to the jury is further confirmed by the fact that after the "conference at the bench", and before reading from the statement, Mr. Hilly stated that he was about to read "this particular portion", and the learned Trial Court said (219):

"The portion that you are about to read deals only with the witness's credibility and is being admitted for that purpose only."

It is submitted that the foregoing observations of the Court and the uncontradicted statements of Mr. Delaney at the time of sentence, all of which appear in the record, show that only part of Boruck's statement was admitted in evidence and read to the jury during the trial; that objection was made to the sending of the entire document to the jury room, and that the learned Court below erred in passing this error on the ground that the record does not show its commission.

POINT VI

The Trial judge charged the jury that they could find petitioners guilty of the conspiracy charged in the indictment—to receive and possess—if they found any one of the alleged overt acts had been proved. This was error because four of the six overt acts alleged related to an entirely different conspiracy, i. e. a conspiracy among Cordo, Di Pinto and Lief to steal the goods, in which petitioners were in no way involved.

The Trial Judge instructed the jury (482) that petitioners could be found guilty of the conspiracy alleged in the indictment (to receive and possess) if the Government proved "any one of the acts alleged in the indictment", although, of the six overt acts alleged in the indictment, four related exclusively to a conspiracy among Cordo, Di Pinto and Lief to steal the goods (7-8)—a conspiracy of which petitioners are not even claimed to have had any knowledge, in which they are not claimed to have participated in any way, and which was completely consummated by the theft before either of the petitioners had had any communication or contact with anyone in reference to the goods.

The result was that the jury were left free to find petitioners guilty of a conspiracy to receive and possess stolen goods, even though the only evidence of conspiracy was

evidence of an entirely different one, to which petitioners were utter strangers and of which they were completely innocent.

This, we submit, was error.

POINT VII

The only evidence of guilty knowledge on the part of Minkoff and Bernard Boruck was testimony by Cordo that he told them the goods had been stolen. In a subsequent, unrelated prosecution of the purchaser of these goods, Cordo testified that he did not tell Minkoff the goods were stolen. It was error to deny petitioners' application for a new trial on the ground of this newly discovered evidence.

The only evidence in this case that Minkoff and Bernard Boruck knew that the goods had been stolen was testimony by Cordo to the effect that he had told them so (10-11, 13).*

The day following the conviction of petitioners Minkoff and Bernard Boruck, and on January 18, 1950, there came on for trial the case of *U. S.* v. *Smolin,* in which Smolin was charged with having received the very goods referred to above, with knowledge that they were stolen goods. Again, the chief witness for the Government was Cordo. Referring to his testimony in the instant case, Cordo testified in the *Smolin* case (11-12):

> "Q. Do you recall that you also testified that you tried to sell these goods to Minkoff? I believe, on a Sunday? A. That is right.
>
> * * * * * *

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* The references in this Point are to the pages of the Transcript of Record on the appeal to the Court of Appeals from the order in reference to petitioners' application for a new trial.

Q. Did you at that time tell Minkoff what the goods were? A. I told him it was dress material.

* * * * * * *

Q. But you did not tell them anything else, you just told Minkoff dress goods? A. That is right.

* * * * * * *

Q. *You did not tell him for example, it was stolen goods?* A. *No, sir*".

Petitioners promptly took steps to procure a new trial because of this recantation. The learned District Judge denied the motion and the Court of Appeals dismissed the appeal therefrom on the grounds (1) that it is not shown that in the *Smolin* case Cordo recanted the testimony he gave here to the effect that he told Minkoff the goods had been stolen, and (2) that Cordo was of so "unsavory a character" that proof of his recantation would not have affected his credibility "more than negligibly", and (3) that the denial of a new trial was not an abuse of discretion by the District Court.

Recantation is said by the learned Court below not to have been shown because of Cordo's mere assertion (20) that he either misunderstood the question put to him in the *Smolin* case, or else the court reporter misunderstood his answer.

We respectfully direct the Court's attention to the context in which Cordo's answer in the *Smolin* case was given, from which it is plain that he did not misunderstand the question and that his present suggestion that he did is but further evidence of the utter irresponsibility and untrustworthiness of this man on whom the Government's case was so largely dependent. As far as concerns Cordo's suggestion that the court reporter erred, it is obvious that the suggestion is insincere. If the answer had been incorrectly recorded (a) the record containing it would not have been certified as correct on the appeal in the *Smolin* case; (b) an affidavit of the court reporter would have been submitted; and (c) an affidavit of the United States Attorney who tried the case would have been submitted.

Whether or not Cordo is of so "unsavory a character" that proof of his recantation would have affected his credibility with the jury only "negligibly" is, we submit, a question on which a jury should have been permitted to pass. Though Cordo's criminal record affected his credibility generally, it is not comparable to proof that in another case, tried immediately after this one, he had testified to the contrary of the very evidence which he gave here—evidence which was not corroborated by any other witness and without which there could have been no conviction. Such proof might well have a much more persuasive effect upon the minds of the jury than proof of criminality in other unrelated matters. In any event, we submit it should have been left to a jury to decide.

The refusal to afford petitioners an opportunity to produce proof of such recantation was, we submit, a serious abuse of discretion.

> *Pettine* v. *Territory of New Mexico,* 8th Cir., 201 Fed. 489;
> *Martin* v. *U. S.,* 5th Cir., 17 Fed. (2d) 973 (C. C. A. 5th Cir.);
> *U. S.* v. *Miller,* 61 Fed. Supp. 919 (D. C., S. D. N. Y.).

In the *Pettine* case, the main issue was whether a killing was murder or justifiable homicide. A witness was produced who testified, in direct contradiction to defendant, that the defendant had a preconceived intention to kill. After the verdict of murder in the second degree, the witness made an affidavit to the effect that his testimony given at the trial had been false. The Circuit Court of Appeals, in reversing an order denying a motion for a new trial, said (p. 493):

> "* * * He was entitled to an acquittal unless the evidence proved him guilty of some degree of murder beyond a reasonable doubt. Who can say that this false testimony of Campagnoli, directly impeaching Pettine and contradicting his testimony on the great issue at the trial, his preconceived intention, was not

> the very evidence which removed the reasonable doubt whether his testimony that at the second encounter he was the assailed and not the assailant was true, and prevented his acquittal. The legal presumption is that this false testimony was prejudicial, and it is far from clear beyond doubt that it was not crucial evidence without which Pettine's evidence would have been believed, the killing would have been found to be justifiable homicide, and he would have been acquitted. * * *"

In the *Miller* case, 61 Fed. Supp. 919 (D. C., S. D. N. Y.) the defendant was convicted by the testimony of a co-defendant who pleaded guilty and became a government witness. The co-defendant had given the Federal Bureau of Investigation statements that substantially contradicted his later testimony at the trial.

Miller had appealed his conviction to the Circuit Court of Appeals, but before the decision was handed down that Court remanded the matter to the District Court to decide the motion for a new trial. The lower Court granted the new trial stating at page 924:

> "* * * The Court is unable to determine what effect it would have had on the jury had they known of these contradictory statements made by Contento—it may have changed the result. While Contento now testifies that the testimony he gave upon the trial was truthful, nevertheless it is difficult to determine where the truth lies in view of the contradictory character of his statements before trial, his testimony upon this motion, the telegram and the letters which he wrote to his attorney, which he now claims to be false and which he says he intended that his attorney should present to the court on an application to modify his sentence."

In *Martin* v. *U. S.*, 5th Cir., 17 Fed. (2d) 973, certiorari denied 275 U. S. 527, the Court said (p. 976):

> "[3] In our opinion it is the duty of a trial court to grant a new trial, where a witness at the original trial subsequently admits on oath that he committed perjury, or even that he was mistaken in his testimony,

> provided such testimony related to a material issue, and was not merely cumulative. * * * there is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial, there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown, at the time of the original trial."

The significant shift in testimony by Cordo at the *Smolin* trial is newly discovered evidence of the most persuasive character; it is the direct opposite of his testimony at the trial herein and, if presented to the jury, would destroy the only piece of testimony in the entire record to the effect that Minkoff was told the goods had been stolen.

Despite Cordo's long and vicious criminal record (Transcript of Record on Appeal from Judgment, fols. 61-62, 83-85), he was able at the trial to avoid self-contradiction. Who would venture to say that his subsequent contradiction on a matter going to the very vitals of the case, if now disclosed to a jury, would not probably change the result?

CONCLUSION

The petition should be granted.

February 5, 1951.

Respectfully submitted,

JESSE CLIMENKO,
Attorney for Petitioners.

GEORGE TROSK,
JESSE CLIMENKO,
of Counsel.

Opinion of United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 70—October Term, 1950.

(Argued November 9, 1950 Decided January 9, 1951.)

Docket No. 21780

UNITED STATES OF AMERICA,

Appellee,

against

VITO JORDAN CORDO, PASQUALE WILLIAM DI PINTO, ARTHUR LIEF, HARRY MINKOFF, MAX BORUCK, BERNARD BORUCK and JAMES BORUCK,

Defendants,

HARRY MINKOFF and BERNARD BORUCK,

Appellants.

Before:

AUGUSTUS N. HAND, CHASE and CLARK,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York. Affirmed.

IRVING H. SAYPOL, United States Attorney for the Southern District of New York, *Attorney for Appellee.*

BRUNO SCHACHNER,
JOHN D. KELLY,
A. A. BLINDER,
Assistant United States Attorneys, of Counsel.

GALLOP CLIMENKO & GOULD, *Attorneys for Appellants.*
GEORGE TROSK,
JESSE CLIMENKO, of Counsel.

CHASE, *Circuit Judge:*

Bernard Boruck, Harry Minkoff, Vito Jordan Cordo, Pasquale William di Pinto, Arthur Lief, Max Boruck and James Boruck were charged in count one of an indictment with possessing goods stolen from interstate commerce knowing them to have been stolen, and in count two with having conspired with each other and with other persons unknown to receive and possess such goods contrary to the provisions of 18 U. S. C. § 409.[1] Cordo, di Pinto and Lief, having first changed their pleas from not guilty to guilty, testified in behalf of the government at the trial of the others. Max Boruck and James Boruck were acquitted by the jury. Harry Minkoff was convicted and sentenced to imprisonment on both counts, his sentence on count two being less than, and running concurrently with, his sentence on count one. Bernard Boruck was convicted and sentenced on count one only. Both Minkoff and Bernard Boruck have appealed.

---

[1] Now 18 U. S. C. § 659.

The goods which were stolen are the same as those which were involved in Smolin's appeal in *United States* v. *Smolin,* 2 Cir., 182 F. 2d 782. The appellants had to do with them while the thieves were trying to sell them to Minkoff before they were purchased by Smolin, and the evidence of the theft of the goods from interstate commerce was substantially the same as that in the *Smolin* case.

There was evidence from which the jury could have found the following facts. On April 26, 1946, certain cartons or bales of textile goods were received at the terminal of the Whisenant Transfer Company in New York City. They had been sent to the terminal from textile mills in North Carolina and were being held there for delivery to consignees in New York City, the name of the consignor and that of the consignee being plainly marked on each carton or bale. On Saturday, April 27, 1946, part of these cartons or bales were stolen from the warehouse by Cordo, di Pinto, and Lief and taken in a closed truck to a parking place across the street from Cordo's home in Brooklyn. The next morning Cordo telephoned appellant Minkoff that he had some "piece goods" for sale. Minkoff later in the day went to Cordo's home where Cordo met him outside and pointed out the truck across the street, telling Minkoff it contained a load of "hot" goods which had been "taken" the previous day. Minkoff did not go to the truck but told Cordo to send it the next morning to a garage at 17th Street and 10th Avenue in New York City. This was done. The garage turned out to be that of the Authority Trucking Company, which was a partnership consisting of appellant Bernard Boruck and his father Max and brother James, from whom appellant Minkoff rented a comparatively small space for storing materials used in a fertilizer business he conducted. Cordo arrived at the garage soon after the truck did and told appellant Boruck and his brother that it contained a load of "hot" goods which Minkoff had told him to send there. Following their instructions, the truck was then backed into

and to the rear of the garage, where they began to unload the goods onto a platform near a door leading into an adjoining building. The unloading had but begun, however, when Max Boruck appeared and refused to let the goods be unloaded or left in the garage because he had reported a burglary which had occurred there the night before and police were coming to investigate. Appellant Minkoff, who had by then arrived, insisted that the goods must be stored somewhere. Appellant Boruck said they could be put in an empty trailer which was parked in a nearby lot, and he, with his brother, assisted in transferring them from the truck to the trailer. Afterwards Minkoff went to the trailer with Max Boruck and came back with a sample of the goods. He then offered $3,000.00 for the loot but Cordo refused and said he would take it away. Minkoff insisted that "with all this excitement" it would be too dangerous to remove the goods before the next day. He prevailed in having them left in the trailer until the following day, when they were taken away.

The appellants seek reversal because, although they had nothing to do with any theft or conspiracy to steal, evidence of both was admitted; because there was insufficient proof (1) that the stolen goods were part of an interstate shipment, and (2) that they were ever in possession of them. Also, Boruck relies upon the admission, and submission to the jury, of a statement he gave the F. B. I. after his arrest, and Minkoff upon lack of proof (1) that he conspired to possess the goods and (2) that he knew they had been stolen from interstate commerce.

While it is true that neither of these appellants were concerned in any way with the theft of the goods, proof of the theft and the surrounding circumstances was relevant, and indeed necessary, to prove that they had possessed and conspired to possess goods which had been stolen from interstate commerce as charged in the indictment. *United States* v. *Tannuzzo*, 2 Cir., 174 F. 2d 177; cert. denied, 338 U. S. 815.

The asserted lack of evidence to prove the interstate character of the goods when stolen fails in the light of the proof that the cartons and bales were each plainly labelled with the names of the North Carolina consignor and the New York consignees. *Cf. United States* v. *Smolin,* 2 Cir., 182 F. 2d 782.

Nor was the evidence insufficient to show custody and control of the goods by appellant Boruck, which amounts to that possession made unlawful by the statute. He was one of the partners in control of the garage. After he and his brother had accepted the goods for storage there, it was he who provided a substitute, the trailer, and helped put them there. We think this an adequate basis on which the jury could find that he had the requisite possession of the goods while they were in the trailer. Of course this was not exclusive possession for he acted with and for Minkoff, who had taken it upon himself to store the goods and had insisted that his landlord provide the storage space. Since the trailer was provided for that purpose, the situation is no different for the purposes of this appeal than it would be if a part of the garage had been so used. The trailer was owned by a company for whom the Borucks were dispatchers, and appellant Boruck knew it would be unused by its owner for a few days and available to him for the storage use to which he put it. Thus there was sufficient evidence to enable the jury to find that both the appellants possessed the goods.

The statement given the F. B. I. was received in evidence without objection, and the argument now made that it was the result of coercion or illegal detention contrary to the McNabb rule [2] is not based upon facts which show that. Moreover, the statement was not in any real sense a confession but was obviously intended to be exculpatory. When it was submitted to the jury with other exhibits it was as written and signed, but error is now urged because it is said that counsel had agreed that some portion should

[2] *McNabb* v. *United States,* 318 U. S. 332.

be omitted. Such an understanding was not admitted, or shown by this record, and that leaves nothing to support this claimed error.

The conviction of Minkoff under the second count is attacked on the basis of *United States* v. *Zeuli,* 2 Cir., 137 F. 2d 845, in which we held that cooperation inherent in the commission of the substantive offense does not constitute a criminal conspiracy. That decision has no application when cooperation is not an element of the substantive crime. *United States* v. *Simonds,* 2 Cir., 148 F. 2d 177; *United States* v. *Loew,* 2 Cir., 145 F. 2d 332, cert. denied 324 U. S. 840. And no cooperation is required for consummation of the crime of possessing stolen goods; the thief alone may be guilty. *Carroll* v. *Sanford,* 5 Cir., 167 F. 2d 878; *United States* v. *Dunbar,* 7 Cir., 149 F. 2d 151, cert. denied, 325 U. S. 889.

Proof of knowledge that the goods had been stolen from interstate commerce, necessary to the conviction for conspiracy but not for the crime of possession,[3] was adequately supplied by the evidence that Minkoff inspected the cartons and bales, and that they were clearly marked with the names and addresses of the North Carolina consignors and the New York consignees. *United States* v. *Smolin, supra.*

Furthermore, the sentence under count one is longer than, and is to run concurrently with, the conspiracy sentence, so that neither of the alleged errors under the second count would require reversal. See, *Abrams* v. *United States,* 250 U. S. 616; *United States* v. *Bronson,* 2 Cir., 145 F. 2d 939.

Judgment affirmed.

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[3] *United States* v. *Sherman,* 2 Cir., 171 F. 2d 619.

Appeal from Denial of a Motion for a New Trial.

The appellants have also appealed from an order denying their motion for a new trial. The basis for that motion was that Cordo, after this trial had ended, testified at the trial of *United States* v. *Smolin,* to which reference had been made in the foregoing opinion, that he did not tell Minkoff that the goods had been stolen. As Cordo had testified in this trial that he had told appellant Minkoff that the goods were "hot," this change in his testimony was relied on by both appellants as self-impeachment so substantial as to entitle them to a new trial. The necessary procedural steps were taken after appeal to have the District Court pass upon the motion in compliance with Rule 33 of the Federal Rules of Criminal Procedure.

At the hearing there was enough to show that Cordo had not recanted and that he insisted that either he had misunderstood the question he was asked at the Smolin trial or that his answer had been misunderstood. However that may be, he was shown at this trial to have had a criminal record, to have pleaded guilty to several crimes for which he had not yet been sentenced, and to have turned government's witness before as he was doing here. It is hardly to be supposed that, upon a new trial, the credibility of so unsavory a character would be more than negligibly affected by such proposed evidence as this, even if the contradiction could be established. At any rate there is much less than enough to show any abuse of discretion in the denial of the motion. Absent such a showing, the appeal is frivolous. *United States* v. *Johnson,* 327 U. S. 106.

Appeal dismissed.

United States Code, Title 18, Section 88 *

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

United States Code, Title 18, Section 409 as Amended †

Interstate or foreign baggage, express or freight; state prosecutions.

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any

* Now Section 371.

† Now § 659 which, by amendment subsequent to the date of the indictment inserted "embezzled or" preceding "stolen" in the second and fourth paragraphs, and by substituting "whoever" for "who" preceding "buys" in the fourth paragraph.

goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or who buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen,

shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts.

321—Affidavit of Service by Mail.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
71 BROADWAY AND 1 RECTOR ST., NEW YORK

SUPREME COURT OF THE UNITED STATES

HARRY MINKOFF AND BERNARD BORUCK
PETITIONERS ~~Plaintiff~~,
against
UNITED STATES OF AMERICA
RESPONDENT ~~Defendant~~.

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of NEW YORK ss.:

Leon N. Bernstein, being duly sworn deposes and says that he is employed by the attorney for the above named petitioners herein. That he is over 21 years of age, is not a party to the action and resides at 37-05 79 St, Jackson Hts., NY

That on the 6th day of February, 1951, he served the within petition for a writ of certiorari to the ~~the~~ United States Court of Appeals for the 2nd Circuit, and supporting brief, record upon Philip B. Perlman, Solicitor General of the U.S., attorney for the above named respondent by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Post-Office ~~a Branch Post Office a Post Office Box~~ regularly maintained by the United States Government at 90 Church St., NYC, NY that being then the post-office of the attorney serving the same; directed to the said attorney for the respondent at ~~No~~ Washington, D.C. ~~N.Y.~~, that being the address within the state designated by him for that purpose, or the place where he then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this 6th day of February, 1951

Alice A. Muenz

ALICE A. MUENZ
Notary Public for the State of New York
Qualified in New York County
No. 31-2804250
Cert. filed with City Reg. N. Y. County
Commission Expires March 30, 1951

Leon N. Bernstein.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 542

HARRY MINKOFF AND BERNARD BORUCK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (II R. 27-32)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1951 (II R. 32-33). The petition for a writ of certiorari was filed on February

[1] The record is in two volumes. The first volume, containing 532 pages, will be referred to as "R."; the second volume, of 33 pages, as "II R."

8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a prosecution for possessing goods stolen from interstate commerce, the evidence was sufficient to prove that the stolen goods were part of a shipment in interstate commerce.

2. Whether the evidence was sufficient to prove that petitioners had possession of the stolen goods within the meaning of the statute proscribing such possession.

3. Whether the voluntary and admittedly truthful statement, not in the nature of a confession, which petitioner Boruck gave to the Federal Bureau of Investigation, was inadmissible under the rule of *McNabb* v. *United States,* 318 U.S. 322.

4. Whether, in the circumstances of this case, it was error to deliver to the jury, at their request, and in the absence of objection, petitioner Boruck's entire statement to the F.B.I., including a paragraph which, allegedly, was not originally received in evidence.

5. Whether the trial court abused its discretion in ruling that, if the case were remanded by the Court of Appeals, it would not grant a new trial on the ground of newly discovered evidence in the nature of an alleged recantation by a government witness.

STATUTE INVOLVED

18 U.S.C. [1940 ed.] 409 (now 18 U.S.C. 659) provided in pertinent part at the time of the commission of the alleged offenses here involved (April 29, 1946):

> * * * Whoever shall * * * steal * * * from any [of certain designated types of places] * * * any goods or property moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, * * * or shall buy, receive, or have in his possession any such goods or property, knowing the same to have been * * * stolen * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

STATEMENT

In a two-count indictment (R. 6-8), filed December 22, 1948 (II R. 1), in the District Court for the Southern District of New York, petitioners, together with Vito Cordo, Pasquale Di Pinto, Arthur Lief, Max Boruck, and James Boruck, were charged with possessing goods stolen from interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. [1940 ed.] 409, *supra* (count 1), and with having conspired to receive and possess such goods, in violation of 18 U.S.C. [1940 ed.] 88 (count 2). Before trial Cordo, Di Pinto, and Lief changed their previous pleas of not guilty to guilty (II R. 1, 2), and subsequently became government witnesses. Following a trial by jury, petitioner Minkoff was found guilty on

both counts (R. 486), and was sentenced to five years' imprisonment on count 1 and to two years' imprisonment on count 2, the terms to run concurrently (R. 507). Petitioner Boruck was found guilty on count 1 and not guilty on count 2 (R. 486), and was sentenced to two years' imprisonment (R. 506-507). Max Boruck and James Boruck were found not guilty on both counts (R. 486). On appeal to the Court of Appeals for the Second Circuit, the convictions of petitioners were affirmed (II R. 32).

The evidence adduced by the Government may be summarized as follows:

A number of cartons and bales of textile piece goods, with the names of the consignors and the various consignees in New York City, were shipped from Maiden, North Carolina, and received at the Whisenant Transfer Company in New York City on April 26, 1946, to be delivered from there to the consignees to whom they were being shipped (R. 26-28, 32-34, 38-40, 50, 54-57, Gov. Ex. 1, at R. 516). When the shipment was checked against the freight bills, no shortages were noted upon the truck manifest (R. 33-34).

On Saturday afternoon, April 27, Cordo, Di Pinto, and Lief, a former Whisenant employee (R. 48-49), stole approximately twenty cartons of this shipment from the Whisenant warehouse, and loaded them on a truck which they had rented for the occasion. Di Pinto drove the truck to an open lot in Brooklyn across the street from Cordo's

home. (R. 62-68, 107-109, 145-148.) On Sunday morning, April 28, Cordo telephoned petitioner Minkoff that he had some "piece goods" for sale. Minkoff came to Cordo's house shortly after noon to discuss the matter. (R. 69-70, 89.) Pointing to the truck across the street, Cordo told Minkoff that he had a "load of hot goods" on the truck and that it had been "taken Saturday" (R. 71). Cordo stated that he had no place to put the goods and told Minkoff that "if he wanted it, I would bring it down to him wherever he wanted" (R. 71). When asked if he was interested in the goods, Minkoff replied, "Yes" (R. 93). Minkoff, without examining the goods, directed Cordo to send the truck on Monday morning to a garage at 17th Street and 10th Avenue in New York City, where the two would meet (R. 71, 93-94).

A partnership consisting of petitioner Bernard Boruck, his brother James, and his father Max were the owners of this garage, operating under the name of Authority Trucking Company (R. 177-178, 249, 285). Minkoff had rented a small area in this garage for the purpose of storing materials used in his fertilizer business, and also paid the Borucks for the privilege of using their telephone (R. 181-182, 232, 320). In accordance with Minkoff's instructions, Cordo arranged for Di Pinto to drive the truck to the garage and take one Varelli with him on Monday morning, April 29 (R. 71-72, 95, 110). Cordo, on arriving at the garage that morning, told petitioner Bernard

Boruck and his brother James: "I got a load of hot goods and Harry [Minkoff] told me to bring it down here this morning * * * I want to get it unloaded fast because I want to get rid of the truck" (R. 72-73, 96-97). According to Cordo's testimony, he, Varelli, and the two Boruck brothers began to unload the goods onto a platform near a door leading into an adjoining building. However, Max Boruck refused to permit the goods to remain in the garage because a burglary of some radios and liquor had occurred there the night before, and he was awaiting the arrival of some detectives who were coming to make an investigation. (R. 73, 253-254.) Di Pinto argued with Max Boruck, remarking that the latter was "worried about a few cases of scotch and we had a $30,000 load of hot stuff" (R. 112, 131).

After Minkoff arrived at the garage and insisted that a storage place be found for the goods (R. 187, 200-202), petitioner Bernard Boruck stated they could be placed in an empty trailer on a 14th Street lot several blocks away[2] (R. 112-113, 187). Bernard Boruck, accompanied by his brother James, went to the lot to point out the trailer (R. 187).

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[2] This trailer was owned by the United Trucking Corporation, which kept its trucks on the 14th Street lot, but received its telephone messages at the Borucks' garage (R. 188, 259, 321-322). The Borucks knew that the trailer was on the lot and empty, because on the previous Friday night, the trucking company's driver, not wanting to leave certain liquor unattended on the lot over the weekend, got permission from the Borucks to leave it in their garage (R. 189, 254, 321).

After Di Pinto and Varelli took the loaded truck to the lot, they stood on the tailboard of the truck and passed the cartons to the Boruck brothers, who were inside the trailer. According to Di Pinto, the Boruck brothers, at one point in the unloading process, "ripped a couple of corners off a couple of the cartons." (R. 113-114, 137.)

After the truck left the garage, Minkoff told Cordo that "he first wanted to look at the material to see what it was, and then he would give [him] a price." While Cordo remained at the garage, Max Boruck and Minkoff went to the trailer, and, when they returned, "they had one roll of piece goods with them." Minkoff offered Cordo $3,000 for the load, but the latter demanded $5,000. (R. 75.) When no agreement could be reached, Cordo said, "All right, I am taking the truck, I am going to pick it up," to which Minkoff replied, "You can't pick it up now, not with all this excitement going on. You will have to pick it up tomorrow" (R. 75-76).

Soon after the above-described negotiations ended, Minkoff said to Bernard Boruck, "Bernie, has the truck a lock on it?" to which Bernard answered, "No, it has no lock." Minkoff then remarked, "There's piece goods in there." (R. 195.) However, Bernard took no steps towards procuring a lock for the goods, which consequently remained in the unlocked trailer until they were

later removed and sold to one Smolin (R. 76, 114).

The defendants' testimony contradicted portions of this evidence, although the theft and subsequent disposition of the goods were admitted.

ARGUMENT

1. While conceding that Cordo, Di Pinto, and Lief stole a quantity of goods from the Whisenant terminal, petitioners argue that there is no proof that what they took was part of a particular shipment which the evidence showed was in interstate commerce (Pet. 20-22). A similar argument was cogently rejected in *United States* v. *Smolin*, 182 F. 2d 783, 785 (C.A. 2), which involved the sale of the same stolen goods that are here involved, and what was said there applies with equal force in the instant case.

There was no shortage of goods on the truck manifest (Gov. Ex. 1, R. 516) showing the interstate shipment from Maiden, North Carolina, to New York City, and the receipt of the shipment on April 26 was noted on the truck manifest (R. 33-34). Some 23 cartons were missing from the terminal when George Leeds, the general traffic manager of the Whisenant warehouse, checked the goods on Monday, April 29 (R. 51-52, 59). Leeds, on the previous Saturday afternoon, had seen the markings on the cartons later found missing, including the marks of the North Carolina consignors and the names and addresses of the New York City consignees to whom the goods were to be

delivered (R. 56, 57). He knew "exactly what was missing" when making his check on Monday morning because he had the originals of Government Exhibits 2-7, which were attached to the claims sent to the insurance company after the consignees presented claims for their lost goods (R. 57-58). Further, the amount and weights of the merchandise missing and the estimates given by the thieves approximately corresponded. Cordo testified that 20 to 22 cartons had been stolen (R. 66); Di Pinto, 19 or 20 cartons (R. 109); and Lief, 17 or 20 cartons (R. 147). From the truck manifest and freight bills it appeared that most of the stolen cartons weighed approximately 200 pounds or more (R. 38-40; Gov. Ex. 1, R. 516). Cordo testified the weights were "200, 250, 350, 400" pounds (R. 87). The jury were clearly justified in inferring from this evidence that the piece goods stolen from the terminal were the same as those which petitioner Minkoff was interested in purchasing. Cf. *United States* v. *De Normand,* 149 F. 2d 622, 625 (C. A. 2), certiorari denied, 326 U.S. 756; *Bloch* v. *United States,* 261 Fed. 321, 324-325 (C.A. 5), certiorari denied, 253 U.S. 484.

2. There is no merit in petitioners' contention that the evidence is insufficient to prove that either of them had possession of the stolen goods within the meaning of 18 U.S.C. [1940 ed.] 409, *supra,* p. 3 (Pet. 25-29). In response to a juror's question as to "whether or not directing the goods is

possession," the trial court properly instructed (R. 479):

> I think I can answer your question this way: by saying that the possession contemplated by the statute does not necessarily mean having the so-called bird in the hand. Constructive possession is sufficient, that is, if the defendants had dominion or control over the goods in question. That is the legal notion of possession, the possession contemplated by the statute in this case.

None of the cases relied upon by petitioners (see Pet. 26-27) involves the statute here in question. The decisions are clearly distinguishable, and most of the language cited is dictum. *Grantello* v. *United States,* 3 F. 2d 117 (C.A. 8), *Toney* v. *United States,* 67 F. 2d 573 (C.A. D.C.), and *Patrilo* v. *United States,* 7 F. 2d 804 (C.A. 8), were concerned primarily with the accused's lack of control over the premises upon which contraband was found. In *United States* v. *Curzio,* 170 F. 2d 354, 357 (C.A. 3), the court recognized that if the jury had been properly instructed, there was sufficient circumstantial evidence for them to have inferred that the defendant had possession of the ration stamps. In *Colbaugh* v. *United States,* 15 F. 2d 929, 930 (C.A. 8), "defendant was not seen in manual possession of any whiskey at any time, nor was any found on his person when arrested, or in the automobile in which defendant and Cope

[his friend who had the whiskey] had driven to this place."

It was not necessary that petitioners take manual possession of the stolen goods; their constructive possession, as enunciated in the court's charge, was sufficient for their conviction. Cf. *Le Fanti* v. *United States,* 259 Fed. 460 (C.A. 3); *United States* v. *De Normand, supra,* 149 F. 2d at 624. The evidence here adduced was clearly sufficient to show that petitioners had at least constructive possession of the stolen property here involved. The Borucks were storing the loot under directions from their tenant Minkoff (R. 200-202, 205). When Minkoff failed to agree upon a deal with Cordo for the purchase of the goods, he cautioned the thieves against moving them until the following day (R. 76). Minkoff was concerned about the safety of the loot before it would be moved, since he asked petitioner Boruck if the truck had a lock on it (R. 195). Though the latter knew that the goods were "hot" and that Cordo wanted to get them "unloaded fast" (R. 72-73, 96-97), he assisted in partially unloading them at his garage (R. 73). Moreover, because his father refused to store the loot on the garage premises (R. 73), petitioner Boruck, in accordance with Minkoff's request, consented to the use of the trailer and helped to load the goods on it (R. 113-114, 137, 187, 200-202). As the court below correctly observed, "Since the trailer was provided for that

purpose [storing the stolen goods for Minkoff], the situation is no different for the purposes of this appeal than it would be if a part of the garage had been so used" (II R. 30). So long as the stolen goods were in the trailer, both petitioners had constructive possession, for they had the power either to move them or to prevent their removal.

3. Petitioner Boruck contends (Pet. 29-34) that the introduction in evidence of the statement he gave to the F.B.I. (Gov. Ex. 12, R. 522-524) was in violation of the rule of *McNabb* v. *United States*, 318 U.S. 322, because the statement was given "after seven hours of interrogation, without prior arraignment and without benefit of counsel or advice that he was entitled to counsel" (Pet. 29). The contention is without merit. He points to nothing in the record—and there is nothing—which indicates that he had not been arraigned when he gave the statement in question, or that he was without counsel and had not been advised of his right to counsel at the time. Indeed, the sole evidence in the record as to the duration of the interrogation which preceded the giving of the statement is the following fragmentary utterance made by him, in the course of his cross-examination, while he was attempting to reconcile portions of his direct testimony at the trial with parts of the statement: "Sure. After all when you are questioned for seven hours—" (R. 205). It is on this, his own exclamatory, non-declaratory remark

alone, in the entire record, that he relies in his attempt to inject a *McNabb* issue into this case.

The fact is that the statement in question was received in evidence at the trial without objection, either before or after verdict. There not only was no hearing in the trial court as to whether this statement might have been inadmissible under the *McNabb* rule; there was no contention, or even suggestion, that it might have been. The *McNabb* issue was sought to be injected into this case for the first time on appeal, with no more foundation for the claim of inadmissibility than the fragmentary exclamation of petitioner Boruck on cross-examination above referred to. Furthermore, Boruck conceded at the trial that he read the statement before signing it (R. 205, 220), that it was entirely voluntary (R. 205, 228, 229) and, further, that it was entirely true (R. 199, 200, 201-205, 229, 231). It should be noted, too, as a reading of the statement shows (R. 522-524), that it was generally *exculpatory* rather than incriminating in tone (though it contains various statements from which, when considered in conjunction with independent evidence, the jury could infer guilty knowledge on Boruck's part), and that Boruck intended it to be exculpatory. And it is evident from Boruck's testimony at the trial that he still considered it exculpatory at that time (see R. 229, 231).

In the light of all the foregoing facts, it is plain, we submit, that there is no *McNabb* issue in this case.

4. Petitioner Boruck's contention (Pet. 34-36) that "it was error to send to the jury the whole of [his] statement, including a part thereof which had not been received in evidence and had not been read to the jury" (Pet. 34) is equally without merit.

The portion of the statement to which reference is made (see R. 508-511) is the fourth paragraph from the end, which reads: "I was under the impression that the piece goods were black market. This was because I knew Minkoff was dealing in black market stuff. Many nights driving home with my father, Jimmie and I told my father that he should get rid of Minkoff. However, my father felt that we needed the sixty dollars rent that we got from Minkoff. Minkoff also helped pay for the phone" (R. 523-524).

After Boruck's statement had been identified by the F.B.I. agents who took it (R. 161-165), the record indicates that the prosecutor, with leave of the court, "read Government's Exhibit 12 in evidence [Boruck's statement] to the jury" (R. 166). So far as appears from that page of the record, the entire document was read at that time. There is some indication, it is true, from certain remarks of Boruck's counsel, made in the course of a colloquy concerning his application for bail pending appeal (see R. 508-511), that the prosecutor omitted the above-quoted paragraph of the statement when he read it to the jury in connection with its admission as part of the Government's case in chief, apparently pursuant to an agree-

ment with Boruck's counsel. But whether the prosecutor did or did not read the paragraph in question at that time is of no present importance for the following reasons:

While Boruck was testifying on his own behalf, he gave testimony which conflicted with many of the statements contained in his statement to the F.B.I. (see, e.g., R. 201-205), including those contained in the paragraph in controversy (see R. 213-221). The prosecutor, accordingly, confronted Boruck with his prior contradictory statements (R. 201-205, 217-221), reading to him, *verbatim,* the statements (among others) contained in the paragraph here in question (R. 217-221). At the request of counsel for petitioner Minkoff (Mr. Levine), the trial judge instructed the jury that Boruck's prior statements, including those made in the paragraph now challenged, were binding on Boruck alone and solely on the question of his credibility (R. 217-219). Counsel for Boruck (Mr. Delaney) made no objection whatever to the confrontation of his client with his prior statements.

After the jury had retired to consider verdicts, they asked the judge for "the statements of the Boruck family made to the F.B.I. (R. 480). The statements requested, including that of petitioner Boruck, were delivered to the jury (R. 483). Counsel for Boruck, contrary to Boruck's present assertion (Pet. 36), made no objections to the jury's receipt, *in toto,* of his client's statement (R. 483). This being the posture of the case, it is clearly im-

material whether or not the particular paragraph of Boruck's statement whose admission he now challenges was originally intended to be introduced as part of the whole statement, or whether or not it was originally read to the jury. For the paragraph in question later became relevant on a different issue, *viz.*, Boruck's credibility as a witness on his own behalf, and was read to the jury, without objection, with appropriate instructions that it was being received for that limited purpose.

5. Neither is there any merit in petitioner Minkoff's contention that he was entitled to a new trial on the ground of newly discovered evidence in the nature of an alleged recantation by Cordo of his testimony that he told Minkoff that the goods were stolen (Pet. 37-41).[3] At the instant trial, Cordo testified that he told Minkoff that he had a "load of hot goods" (R. 71) and that "we just stole a load Saturday" (R. 93). Some days later, in the case of *United States* v. *Smolin*, tried in the same court while the instant cases were pending on appeal, and involving the same stolen goods, Cordo was asked, "You did not tell him [Minkoff], for example, it was stolen goods?" to which he was reported as answering, "No, sir" (II R. 12). Asserting that this was a recantation by Cordo, both petitioners joined in a motion in the District Court (see II R. 8-15) asking for an order indicating that if the instant cases were remanded by

[3] Petitioner Boruck also apparently seeks to take advantage of the alleged recantation by Cordo (Pet. 37), but on what theory he does not make clear.

the Court of Appeals, the District Court would grant new trials on the ground of newly discovered evidence, in accordance with Rule 33, F. R. Crim. P. The motion was denied (II R. 21-22).

We think the court below was clearly right in deciding (II R. 31-32) that there had in fact been no recantation by Cordo and that the trial court had not, consequently, abused its discretion in denying the motion. Cf. *United States* v. *Johnson,* 327 U.S. 106. In an affidavit by Cordo executed subsequently to his alleged recantation, and filed by the Government in opposition to the motion for a new trial (II R. 18-20), Cordo stated that either the transcript in the *Smolin* case was wrong or that he misinterpreted the question as to whether he told Minkoff the goods were stolen (II R. 19). He pointed out that in the remainder of his testimony in the *Smolin* case he "continuously testified that I told everyone to whom I was to sell the stolen merchandise that the goods that I had for sale were 'stolen' or 'hot'" (*ibid.*). And he "again reaffirm[ed] that at all times when dealing with Harry Minkoff with respect to the merchandise that I attempted to sell him, I told him that the merchandise was 'stolen' and 'hot'" (II R. 20). It is clear, we submit, in the light of these facts, that both courts below were warranted in concluding that there had been no recantation in fact, and hence no justification for a new trial.[4]

[4] Petitioner Minkoff also contends that his conviction on the conspiracy count was improper because of an alleged insufficiency of proof that he knew the goods in question were

CONCLUSION

The judgment below is correct, and no conflict of decisions or question warranting further review by this Court is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1951.

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part of an interstate shipment when they were stolen (Pet. 22-25). And it is further contended in the petition for certiorari that the trial judge erred in charging the jury they could find "petitioners" guilty of the conspiracy charged if they found that any one of the alleged overt acts had been proved, the alleged error lying in the fact that some of the overt acts alleged related to the thieves' conspiracy to steal the goods, with which conspiracy they were not connected (Pet. 36-37). It is evident that the latter contention is also advanced on behalf of Minkoff alone, since petitioner Boruck was not convicted on the conspiracy count (R. 486). We do not agree that the evidence of Minkoff's knowledge of the interstate character of the goods was deficient (assuming the relevancy of such evidence), or that the judge's charge was faulty in the respect mentioned. But there is no need to consider either contention, since even if Minkoff's conviction on the conspiracy count were reversible, it would make no difference in this case, his two-year sentence on that count having been directed to run concurrently with his five-year sentence on the substantive count (R. 507). *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

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CHARLES ELMORE

IN THE

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Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

JESSE CLIMENKO,
Attorney for Petitioners.

GEORGE TROSK,
JESSE CLIMENKO,
Of Counsel.

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PETITIONERS' REPLY BRIEF

(Italics Ours)

There are a few statements in the Government's brief which we feel should be discussed.

It is said (p. 4) that a number of cartons

> "were shipped from Maiden, North Carolina, and received at the Whisenant Transfer Company in New York City on April 26, 1946 * * * "

and that

> "When the shipment was checked against the freight bills, no shortages were noted upon the truck manifest."

Continuing, the brief states that on April 27, 1946, Cordo, DiPinto and Lief

> "stole approximately 20 cartons of *this* shipment from the Whisenant Warehouse * * * "

The foregoing statements beg a fundamental question in the case.

That question is: is there any *proof* that the goods which Cordo, DiPinto and Lief stole from the Whisenant Warehouse on April 27, 1946 were part of the shipment which arrived here on April 26 from Maiden, North Carolina. It is highly significant that even the Government does not claim there is: the Government argues merely (brief p. 9) that the jury would have been justified in "*inferring*" such to have been the fact.

That we dispute.

The evidence on which the Government relies (brief pp. 8-9), i.e., Leeds' statement that he knew "exactly what was missing" supports no such inference. All Leeds said is that when, on April 29th, two days *after* the burglary, he checked the goods in the warehouse against the invoice which accompanied a shipment received here on the 26th, the day *before* the burglary, he did not find all the cartons listed on the invoice. But neither Leeds nor any other witness testified that he made a comparison of the goods with the invoice at the time of the receipt of the shipment on the 26th, or that on such a comparison he found in the shipment all the cartons listed on the invoice; indeed, neither Leeds nor any one else testified that he made a comparison of the goods in the warehouse with the cartons listed on the invoice at any time prior to the 29th, which two days was *after* the burglary.

The fact that, following a burglary, there were not found in the warehouse all the cartons listed on an invoice which accompanied a shipment received prior to the burglary does not prove, or justify an "inference," that what was

stolen was part of that shipment, particularly in the absence of proof that the cartons not found after the burglary had been received in that shipment and were in the warehouse up to the time of the burglary.

The Government is not correct when it says (brief p. 8), that prior to the burglary Leeds had seen the markings

> "on the cartons later found missing, including the marks of the North Carolina consignors and the names and addresses of the New York City consignees * * * "

All Leeds said is that the cartons which he saw on Saturday —before the burglary—had markings like the ones he saw on the cartons which were there on Monday. But nowhere did he, or anyone else, say that any of the cartons which he saw on Saturday were not there on Monday. *Non constat,* the cartons he saw on Monday were the same, and only the same, ones that he had seen on Saturday.

Thus there is no proof, and no basis for an "inference", that the stolen goods were part of an interstate shipment.

The point we urge was not raised in the *Smolin* case, the Government's statement (p. 8) to the contrary notwithstanding. Ours is not a case in which reliance is put on a claim that the goods which the thieves had with them may not have been the goods which they stole from Whisenant; neither is this a case, as was the *Smolin* case, in which defendants destroyed the wrappers to expunge evidence of their guilty knowledge of the origin of the goods. Indeed there is no evidence these defendants ever knew what markings were on the cartons here involved.

It is said (Government's brief, pp. 11-12) that petitioners had

> "constructive possession of the goods so long as the stolen goods were in the trailer"

because Bernard Boruck, on Minkoff's importunity, had "provided" the trailer and "consented" to its use by the thieves.

True, Boruck told the thieves where the empty trailer was. However, the trailer did not belong to any of the Borucks. It belonged to United Trucking Corporation, a corporation in which the Borucks had no interest. They never garaged the trailer or drove it; they never had control of it, or dominion over it.

In these circumstances, we submit, Boruck's disclosure to the thieves of the location of the empty trailer did not make petitioners guilty of "possession" of the goods which the thieves deposited therein.

The submission to the jury, during their deliberations, of the whole of Boruck's statement—including the part which had not been introduced into evidence and had not been read to the jury during the trial—is attempted to be justified in one place (brief p. 3) on the ground that, during his cross examination, Boruck gave testimony to the same effect as the matter set forth in the portion which was not introduced, and in another place (p. 16) on the ground that this portion of the statement affected Boruck's "credibility". If, as the Government states, Boruck's testimony was not inconsistent with the portion of the statement in question, that would make it *inadmissible*. But whether on this, or any other ground, it might have been admissible, the fact remains that it was not offered or received in evi-

dence, and not having been admitted, it was improper to send it to the jury for their consideration during their deliberations.

Insofar as the other points raised by us are concerned, we find in the Government's brief nothing which requires further discussion by us.

New York, March 23, 1951

Respectfully submitted,

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